Supreme Court, U.S.
FILED
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051620 MAR 8 - 2006
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In The Supreme Court of the United States

Paulette P. Wright

Petitioner,

v.

Department Of Veterans Affairs

Respondent

On Petition for a Writ of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

Supplemental Appendix 4
Petition for Writ of Certiorari

Sylvia Scott, Esq.
Kenneth Mizrach
Department of Veterans Affairs
385 Tremont Avenue
East Orange, NJ 07108-1095
(973)-676-1000

Paulette P. Wright, Pro Se
515 Mt. Prospect Ave. 2L
Newark, NJ 07104
(973)484-9933

June 15, 2006

Supplemental Appendix 4

United States Of America
Merit System Protection Board
New York Field Office

Paulette P. Wright
Appellant,

Docket Number
NY-0752-04-0201-I-1

v.

Department of Veterans Affairs,
Agency.

Date: July 26, 2004

Eldridge Hawkins, Esquire, East Orange, New Jersey, for the appellant. Sylvia Scott Esquire, East Orange, New Jersey for the agency.

Before

Joseph A. Hallock
Administrative Judge

Initial Decision

Introduction

The appellant filed a timely appeal of the agency's decision to remove her from the position of Dietitian, GS-11, effective March 19, 2004. The hearing she requested was held on June and 9, 2004. The Board has jurisdiction over this appeal. *See* 5 U.S.C. §7511 (a), 7512 and 7513. After the conclusion of the hearing, I issued a bench decision in which I **AFFIRMED** the agency's action. An edited text of the decision follows.

PROCEEDINGS

This is an appeal of the agency's decision to remove the appellant from her position of Dietitian at the VA Medical Center (hospital) in East Orange, New Jersey, effective March 19, 2004. The agency based its decision to remove the appellant based on eight charges which are set forth in detail in its notice of proposed removal dated January 7, 2004. See appeal file (AF), Tab 7, Subtab 4f. The appellant asserted two affirmative defenses: harmful procedural error and retaliation for protected activity.

Burden Of Proof

The agency bears the burden of proving each elements its charges by a preponderance of the evidence. [1] *Burroughs v. Department of the Army*, 918 f. 2d 170, 172 (Fed. Cir 1990). The agency must also prove: (1) The existence of a nexus between the sustained charge (s) and the efficiency of the service, 5 U.S.C. § 7513(a), and (2) reasonableness of its penalty. See *Douglas v. Department of Veterans Administrations*, 5 M.S.P.R. 280, 302 (1981). The appellant bears the burden of proving her affirmative defenses by a preponderance of the evidence. See 5 C.F.R. § 1201.56(a)(2)(iii)

The agency proved its charges with the exception of charge four.

In charge 1, the agency charged that on July 11, 2003, the appellant failed to respond when she was phoned and paged numerous times by Dr. Segal, Teresita Delotero RN, Pravina Patel, Registered Dietitian and Luci Williams Acting Clinical Nutrition

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1 Preponderance of the evidence is that degree of relevant that a reasonable person considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than not. See 5 C.F.R. § 1201.56 (c) (2).

Manager, regarding a patient on unit 5C who needed to be seen. Williams was acting on July 112003, in place of Dipakbala (Dipa) Patel who was absent on this date and would ordinarily have been serving as the appellant's immediate supervisor. Delotero, Pravina Patel and Williams testified on behalf of the agency.

Deltotero testified that she was working on July 11, 2003 and that she was making her round. She got to 5C unit at around 11:30 a.m. She testified that as soon as she got to the unit, people were screaming that a dietitian was needed. She testified that she paged the appellant a few times and got no response to the page. Pravina Patel testified that she was working on unit 4D on July 11, 2003 and she got a call from a doctor from unit 5C between 1:00 p.m. and 1:30 p.m. She testified that she did a number of things in response to the doctor's call, but the upshot is that among the things that she did is that the paged the appellant twice and got no response. These matters were reported to Williams, and there is documentation in the agency file which corroborates this. There is a statement from Deltotero at subtab 4i which is consistent with her testimony. There is a statement at subtab 4r from Pravina Patel which is consistent with her testimony. And there is a statement from Williams at subtab 4q which collaborates Delotero's testimony that she had paged the appellant and had not gotten a response.

The appellant's representative, in his cross- examination of one or more of the agency's witnesses, asked questions the implications of which were that there may have been reasons why the appellant did not response to the pages that Delotero and Pravina Patel made to her, one being that apparently there was a changeover in the pagers

that took place around this time, and another being that perhaps the appellant was at a location where the pager was not working. But with respect to the latter, Williams gave uncontradicted testimony that if a pager was turned on, it would work at all times and in all location in the hospital. And insofar as the changeover of the pagers perhaps having been a contributing factor to the appellant's failure to respond, the appellant was present at the hearing, she was approved as a witness, and yet she did not testify to this effect on her own behalf. So there was really no evidence offered to support a finding in this regard. Furthermore I note that the appellant did furnish a statement dated November 25, 2003which is at subtab 4g in the agency file. This was in response to a notice date November 21, 2003. And, no where in this statement did the appellant say anything about problems with her pager or a change in the pager number. She simply flatly denied that she had engaged in any misconduct.

I also note that in her written response to the agency's proposed removal notice, the appellant made no such allegations. See AF, Tab 7, Subtab 4e. Again she essentially denied the alleged misconduct and claimed that the agency's proposed action was motivated by animus against her. She stated that the charges against her was incredible and had no merit. And she alleged that her proposed removal was a continuation of constant harassment and humiliation against her by her supervisors, but she gave no details concerning the alleged humiliation and harassment. Finally I note that the March 1, 2004 recommendation for removal of Christine C. Machiedo, M.D., who was designated by Kenneth Mizrach, the agency's deciding official, to receive the appellant's oral reply,

contains a summary of the appellant's oral reply which shows, with regard to this charge, that the appellant simply denied that the charge was true and said she always answered her pager in a timely manner. *Id.*, Subtab 4c. This, in itself, is contradicted by the summary of the appellant's oral reply with respect to charge 2, which I will come to in a moment, which also charged the appellant with failing to respond to pages in a timely manner, in reply to which the appellant stated she did not call back right away because she was busy that day.

The appellant representative also asked questions on cross-examination of the agency's witnesses, the imports of which was the appellant may not have known what was required of her insofar as timely responding to pages. But over the appellant's objection, I admitted into evidence as agency's Exhibit 1 a verification of verbal counseling dated October 4, 2000 which I find shows clearly that the appellant knew precisely what was required of her and was aware that a page was a priority matter that had to be responded to immediately. *See* AF, Tab 12. The appellant has argued that this counseling should not have been admitted into evidence, because of some requirements that it had to be destroyed in six months. This was alluded to in testimony, but there was no documentary evidence in the record concerning such a requirement.. Furthermore, I find that, while this counseling may have been time-barred as a basis for any subsequent disciplinary action that the agency may have taken, it was not relied on for such purpose. It was admitted solely for the purpose of showing knowledge on the part of the appellant of what was required of her in responding to pages. Considering all of

the relevant evidence on this charge, I find the charge proven by a preponderance of the evidence.

Charge 2 is on August 28, 2003, the appellant failed to respond in a timely manner when she was paged several times regarding her move plan, beginning ay 10:50 a.m.[2] by Vivian Henry, Supervisory Dietitian, the agency's proposing official, who was Dipa supervisor and the appellant second line supervisor. Henry gave uncontradicted testimony that she tried to page the appellant starting at 10:50 a.m. until 11:00a.m., that she paged her twice, that she waited for the appellant to respond to the page, that she did not get any response, and that she then phoned her and left a message. Further Henry testified that at 11:40 a.m. she had a voice mail message from the appellant. She testified that at 11:50 she left another page, and she then had to leave her office. And, when she returned at 1:00, she had another voice mail message from the appellant.

I find this evidence shows that the appellant failed to respond to the pages, but there was a delay in responding. The charge here is that the appellant failed to respond in a timely manner. So the issue presented is what constitutes a timely manner, and I find that timely with respect to a page meant that it was a priority. When I considered the testimony of Dipa Patel, Delotero, Williams and Henry, as well as the October 4, 2000 verification of verbal counseling, I find that there was a common understanding among employees at the hospital that a page was a priority matter and an employee who received a page was expected to stop what he or she was doing, find the nearest

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2 The agency proposal's notice shows the time as "10:50 P.M." but it is clear from the entire charge, and Henry's testimony, that this is a typographical error.

phone, and respond to the page . I find that the preponderant evidence shows that the appellant failed to do this. Indeed, she admitted as much in her oral response, the summary of which shows that she stated that she did not call Henry back right away because she was busy that day. I therefore, find that charge 2 proven by a preponderance of the evidence.

Charge 3 is that on October 8, 2003, Dipa Patel called the appellant and asked her to come to Patel's office, because Patel was conducting a disciplinary investigation of the allegations outlined in charges 1 and 2. Further the appellant refused to meet with her. She was also disrespectful, stating that Patel and Henry had nothing better to do, and they should get real jobs. The appellant then stated that they (Patel and Henry) could do whatever they wanted and she would not sign anything. Based on this conduct, the appellant was charged with failure to follow her supervisor's instruction, disrespectful conduct to Patel and making disparaging remarks concerning Patel and Henry. Patel come to her office. She testified, again this was uncontradicted testimony, that this event in question did, in fact, occur as detailed in the agency's proposal notice. And that she testified that she was offended by the appellant's response, upset by her behavior, and unable to do her job as a supervisor as a result. Here again the appellant was present at the hearing, she was approved as a witnesses, but she elected not to testify on her own behalf. I therefore, have the uncontradicted testimony of Patel in support of this charge, and I find the charge proven by a preponderance of the evidence.

Charge 4 is that on October 15, 2003, on unit 5D, the appellant complained loudly, stating "this floor is really very

disorganized" in front of both staff and patients present at the nursing station. The appellant was charged with making loud disparaging remarks regarding the operation of a patient care unit. The agency charged that her conduct was especially inappropriate, as her remarks were in a public area and in the present of patients. Delores Fernandez testified on behalf of the agency with respect to this charge. It was based on a report by Fernandez that this charge was brought. Although Fernandez testified on direct examination that she reported the incident to Henry and asked her to speak to the appellant, because she found the appellant's behavior to be unprofessional, on cross-examination she testified that, although in her view the appellant spoke in a loud voice, she did not speak "very loud". Rather according to the witness, the appellant did not speak in the right tone. She further testified that she took no exception to the substance of the appellant's remark, but just to their timing and tone. She conceded that there were other persons present besides herself, none of which complaint about the appellant's behavior. Furthermore, contrary to the agency's proposal notice which charged that the appellant's remark were made in the present of patients. Fernandez's testimony was that patients may have been present. When I considered the entirety of Fernandez's testimony, I concluded that while Fernandez may have been offended by the appellant's remark, her reaction does not appear to have been shared by others who were present. I would expect that if, as charged, the appellant made loud, disparaging remarks, others would have heard the remarks and would have joined in Fernandez's criticism of the appellant. Yet it was only Fernandez who made any complaint about the appellant's behavior. I therefore do not find this charge was

proven by a preponderance of the evidence.

Charge 5 through 8 concern incidents that occurred at various times on October 24, 2003. And there was testimony from Ms. Sheeba Jacob and from Henry, uncontradicted testimony, on these charges. In charge 5, the agency charged the appellant with making inappropriate statements to Jacob, specifically that the appellant stated to Jacob that she was uncomfortably working with her. Jacob was a Dietetic Intern. The appellant was assigned to work with her. Jacob testified that, as charged, the appellant told her she was uncomfortably working with her, since her past made her not trust anyone. She also testified that the appellant told her Dipa Patel and Henry had motives to or grab information pertaining to her. I find that the statements made by the appellant, under the circumstances to a new employee who was assigned to her for training were inappropriate. And, to the extent that they evidence an unwillingness on the appellant's part to work with Jacob, this was inappropriate. I find that there was no reason for this. Jacob testified that the appellant's statement made her feel very bad. I found this reaction was understandable, notwithstanding the fact that the appellant - apparently informed Jacob that it was nothing personal. I find it hard to believe that anyone would have reacted any differently than Jacob on being told that the person they were assigned to work with did not want to work with them, whatever the reason. Accordingly I find this charge was proven.

Charge 6 is that when the appellant saw Henry in a file room which was adjacent to her office, she inappropriately shouted "Oh my God, dirty politics " and went into her office and locked the door. She stated that the door would close from that moment onward. She

asked Jacob to work in another office, and stated she was not interested in working with her, because of the frustration of the day. The charge is that the appellant made inappropriate statement to Jacob and was disrespectful and inappropriate toward Henry. Henry gave uncontradicted testimony in support of this charge. Now, much has been made of the fact that, while the appellant was charged with shouting when she saw Henry "Oh my God dirty politics", in Henry's written statement which is in the record at subtab 4n in the agencys file, Henry indicated that she only heard the appellant say "Oh my God. " Henry admitted in her testimony that she did not hear the appellant say "dirty politics." But Jacob who was present at the time gave, uncontradicted testimony that she heard the appellant say "Oh my God, dirty politics." So, I find from the preponderance of the evidence, that the appellant made the statement attributed to her, and this was inappropriate. I also find the way she reacted upon seeing Henry was inappropriate and disrespectful. That she went into her office locked the door, said she would not come out, and asked Jacob to work in another office, I find all of such behavior was unprovoked and inappropriate under the circumstances. Accordingly, I find this charge was proven.

Charge 7 is that later the same day the appellant locked the outer door to the office suite and, as a result, a locksmith Jeffrey Robinson, who testified for the agency had to come to open the door. Further, that the appellant then emerged from her office and upon observing Henry went back into her office and locked the door, that she did not respond when Henry knocked on the door and called her name, that Henry had to use her key to open the appellant's door.

and that the appellant refused to speak with her, stating she was busy and had nothing to say to her. The appellant was charged with deliberately locking the outer door to the office suite, thereby causing inconvenience and the need to have a locksmith come to open it, and blatantly inappropriate, disrespectful conduct toward Henry.

Robinson gave uncontradicted testimony that the appellant slammed her office door in Henry's face and that he was shocked by what occurred. Although this is not charged, he testified that he heard the appellant say to Henry "I don't appreciate you eavesdropping on my conversation". Apparently the appellant suspected from the presence of Henry in the file room which was next door to her office, that Henry was eavesdropping on her, but the uncontradicted testimony is that the room next door to the appellant's office was a file room which was used to store the files of Henry and Dipa Patel. And Henry gave uncontradicted testimony that she was in the office looking for files, which is something she did regularly on a daily basis, often several times a day. Considering the preponderance of the evidence, I find charge 7 proven.

Charge 8 is similar to charge 3 in that here, again, the charge is that Dipa Patel called the appellant asked her to come to her office to discuss the events that occurred earlier in the day on October 24, and that the appellant refused. Further, the phone then got disconnected and the appellant did not answer the phone when Patel immediately called back, and that she did not come to Patel's office even though a message was left instructing her to do so. The charge is failure to follow instruction and blatantly inappropriate and disrespectful conduct toward a supervisor and toward Henry as the

Service Chief. Both Patel and Henry gave uncontradicted testimony with respect to this charge, which shows preponderance of the evidence, that charge 8 was proven.

The appellant did not prove her defense of harmful procedural error.

To prove harmful procedural error, an appellant must prove the agency committed an error in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *See* 5 C.F.R. & 1201.56 (c)(3). The burden is upon the appellant to show that the agency committed an error and that the error was harmful, i.e., that it caused substantial prejudice to her rights. Reversal of an agency action is warranted only where the procedural error is likely to have had a harmful effect upon the outcome of the case before the agency. *See* Bowden v. Department of the Army, 59 M.S.P.R. 662, 668-69 (1993).

The appellant argued that the agency committed harmful error in a number of respects based on the provision of the applicable collective bargaining agreement. *See* AF, Tab 17. But, I find that, while there have been allegations that such errors occurred, there has been no evidence offered in support of such allegations. Furthermore, when I consider the provisions of the collective bargaining agreement that are cited in the appellant's closing argument, I do not find from my review of the provisions that there is any evidence to show that such provisions were violated. Furthermore, even assuming that there was some violations of some parts of these provisions, I do not find that the appellant has shown that any such violations is likely to have had a harmful effect on the outcome of the case before the agency. Accordingly, I find that the appellant did

not meet her burden of proving that the agency committed any harmful error in reaching its decisions to remove her.

The appellant did not prove her defense of retaliation.

The appellant asserted an affirmative defense of retaliation for protected EEO activity. In order to establish reprisal, an appellant must show that: (1) She engaged in protected activity; (2) the accuse official (s) knew of the activity; (3) the adverse action under review could, under the circumstances, have been retaliation; and (4) a nexus between the retaliation and adverse action. *See Warren v. Department of the Army*, 804 f.2d 654, 656-58 (Fed. Cir. 1986). The final criterion require a more searching scrutiny to determine whether there is a genuine nexus and whether the action was taken in retaliation. *See Oliver v. Department of Health and Human Services*, 34 M.S.P.R. 465, 471 (1987), aff'd 847 f.2d 842 (Fed. Cir.1988) (Table). The appellant has the burden of establishing, by a preponderance of the evidence, that her protected conduct was a substantial or motivating factor in the adverse action taken against her. *See Gomez v. Department of Justice*, 36 M.S.P.R. 56, 61 (1988). I find the record shows the appellant did engaged in protected EEO activity, and that Henry knew of this activity. Therefore , the appellant's removal could, under the circumstances, have been retaliation. The dispositive issue, therefore, is whether there is a genuine nexus between the alleged retaliation and the adverse action. This requires a consideration of all the circumstances and the weighing of the gravity of the misconduct against the strength of the alleged improper motive to retaliate. *See Redschlag v. Department of the Army*, 89 M.S.P.R. 589. 623-24 (2001), *review dismissed*, 32 Fed. Appx. 543 (fed. Cir. 2002). Here, it appears that the alleged

improper motive to retaliate is based on a claim of disparate treatment, at least this was the implication of the questions asked by the appellant's representative on cross-examination of the agency's witnesses, but I do not find that there has been the requisite showing that employees were similarly situated to the appellant were treated more leniently. I find that the misconduct in question was very serious. Having sustained all, but one of the agency's charges, and given the appellant's prior disciplinary record discussed below, I find that the legitimate reasons that the agency had to act in this case outweigh the alleged illegitimate motive. On balance, I find that it was the appellant's misconduct that was the motivation for the agency's action and not her protected EEO activity.

Nexus and Penalty

I find that there is a nexus between the sustained charges and the effi[illegible]y of the service. This brings me to the matter of penalty. Here, o[illegible]he agency's charges has not been sustained. When the Board sust[illegible]ns fewer than all of the agency's charges, the Board may mitigate the agency's penalty to the maximum reasonably penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires a that a lesser penalty be imposed on fewer charges. *Lachance v. Devall*, 178 F. 3d 1246, 1260 (Fed. Cir. 1999).

In this case, the agency has not indicated that a lesser penalty be imposed based on the sustained charges. I find considering the various aggravating and mitigating factors, that the removal is well within the bounds of the maximum reasonable penalty under the circumstances of this case. Although the record shows that the appellant's performance was at least fully successful, and she had

almost eleven years of service, as I stated earlier, the record also shows that she had two prior disciplinary actions for misconduct similar to that at issue in this case. One prior action is a 3-day suspension effective June 24, 2002, for failure to carry out a work assignment and failure to carry out her supervisor's instruction. *See* AF, Tab 7 Subtab 4w; Tab 14. The other is a reprimand dated March 5, 2003.

The Board review of a prior disciplinary action is limited to determining whether that action is clearly erroneous, if the employee was informed of the action in writing, the action is a matter of record, and the employee was permitted to dispute the charges before a higher level of authority than the one that imposed the discipline. *Bolling v. Department of the Air Force*, 9 M.S.P. R. 335, 339-40 (1981). I find that all the condition set forth in *Bolling* are met in this case, and while under *Bolling* the appellant was free to argue that the prior disciplinary action was were clearly erroneous, I heard no argument which would show that they were. I, therefore, find that under *Bolling* the agency was entitled to rely on the prior disciplinary actions, and that the penalty of removal is the maximum reasonable penalty under the particular circumstances of this case.

DECISION

The agency 's action is AFFIRMED

FOR THE BOARD:

Joseph A. Hallock
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. & 1201.112(a) (5).

NOTICE TO APPELLANT

This initial decision will become final on **August 30, 2004**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with he Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEO) or with a federal court. The paragraph that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important, because if you wish to file a petition, you must file in within the proper time period.

BOARD REVIEW

You may request Board review of the initial decision by filing a petition for review. Your petition for review must state your objection to the initial decision, supported by references of applicable laws, regulations, and the record. You must file your

petition with:

The Clerk of the Board
Merit System Protection Board
1615 M Street, NW.,
Washington, DC 20419